Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

No. 74-1361

In the Supreme Court of the United States

OCTOBER TERM, 1975

VICTOR FELIX MAGANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner claims that his right of privacy was violated when police officers entered a driveway adjacent to his house.

After a bench trial in the United States District Court for the Central District of California, petitioner was convicted on four counts charging violations of the federal narcotics laws and was sentenced pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. 5010(b). The court of appeals affirmed (Pet. App. A; 512 F.2d 1169).

1. The evidence, adduced at trial and at a pretrial hearing on petitioner's motion to suppress, showed that on October 12, 1973, Los Angeles police officer Larry M. Davenport was told by an informant, Lawrence James Dunne, that two individuals, Roberto Giovinetti and

Raudel Bugarin, had agreed to sell Dunne eight ounces of heroin (Tr. 9-11).[1] Police officers planned to observe the transaction; Davenport agreed to pose as the buyer.

At 10:30 a.m. the next morning Dunne went to Giovinetti's residence in Glendale, California, and obtained a sample of heroin from Gianetti and Bugarin (Tr. 405-408, 449-459, 520-525). Dunne gave the sample to Officer Davenport and told him that Bugarin had agreed to telephone Dunne at 1 p.m. regarding the sale of eight ounces of heroin (Tr. 410-413).

At the appointed time Dunne received the call from Bugarin. Dunne told Bugarin that his "principal" had arrived from the airport, had accepted the sample, and was prepared to proceed with a purchase of eight ounces (Tr. 414). Dunne and Davenport drove to meet Bugarin, who motioned to them to follow his vehicle (Tr. 416). Bugarin led Dunne and Davenport to within one block of petitioner's home and announced that he would go to his "cousin's" house to "see if everything was cool" (Tr. 18). Bugarin walked to petitioner's house (Tr. 453-457); five minutes later Bugarin returned and told Davenport that the narcotics were available (Tr. 418).

Davenport demanded to see the drugs before he paid. Bugarin took Dunne to the garage adjoining petitioner's residence. There they met petitioner, who produced two packages from under his shirt and gave one to Bugarin. Petitioner and Bugarin unwrapped the packages and

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[1] "Tr." refers to the five-volume transcript of the trial and pretrial hearing. We are lodging the transcript with the Clerk of this Court.

handed them to Dunne for inspection. Petitioner remarked that the heroin was of good quality. Dunne and Bugarin returned to Davenport's vehicle, where Dunne reported his observations (Tr. 418-424). Davenport then gave a prearranged signal to other officers watching the events (Tr. 23, 40).

Police Sergeant Charles Ripley and Officer Joseph Stanley were conducting the surveillance (Tr. 37-38, 309). After the receipt of the signal from Davenport, Ripley drove his police vehicle onto petitioner's driveway. Ripley and Stanley saw petitioner standing by a car parked in the garage, the door of which was open. As the officers stopped their car petitioner approached them, first discarding some wrapping paper onto the ground and tossing a screwdriver into the parked vehicle (Tr. 43, 311). The officers identified themselves and Ripley retrieved the wrapping paper, which smelled of heroin (Tr. 43-46, 478-480). Two condoms containing eight ounces of heroin were in plain view inside the garage. Officer Stanley arrested petitioner while Ripley seized the condoms (Tr. 46). With the consent of the house's occupants, the officers searched the trunk of the automobile parked in the garage. Bags containing more than four and one-half pounds of heroin were found in the panel molding (which had been removed with the screwdriver petitioner had tossed away) (Tr. 471, 482-485).

2. Petitioner claims that his Fourth Amendment rights were violated when Officers Stanley and Ripley drove their police vehicle onto the driveway adjoining his residence. Since the contraband was seized as a result of this entry, he argues, it should have been excluded from evidence.

The controlling standard was enunciated by this Court in *Katz* v. *United States*, 389 U.S. 347, 351-352:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The court of appeals correctly held that petitioner's driveway is not an area of privacy protected against entry by cars (Pet. App. A, p. 3). The driveway was within easy access of anyone—civilian and police officer alike—who desired to come upon it. No gates or fences had to be opened; the residents did not expect that only those who had received permission in advance would enter the driveway. Accordingly, the officers could lawfully enter the driveway in the course of their duties. *United States* v. *Capps*, 435 F.2d 637 (C.A. 9); *United States* v. *Langley*, 466 F.2d 27 (C.A. 6).

A contrary view would mean that officers could not enter a driveway even for the purpose of knocking on the door of the dwelling to seek permission to talk to the occupants. A driveway is generally regarded as a means of access to the house, to be used by all who arrive, and not as a forbidden zone in the nature of a moat. Where, as here, a narcotics dealer chooses to leave the privacy of his house and carry on his activities in

a driveway, he cannot complain that he was observed there by police officers.[2]

The court of appeals carefully respected the holding of *Katz*. In discussing the "expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway," the court observed that there may well be situations where a driveway would fall within a resident's expectation of privacy (Pet. App. A, p. 3). Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443. The test is one of reasonableness, both of the expectation of privacy and of the nature of the entry upon the driveway. The entry in this case occurred at a time when the officers had reason to believe that illegal acts were occurring in or near the driveway, and their entry onto it was reasonable.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Notwithstanding petitioner's reference to the driveway as "curtilage" (Pet. 20), the law of search and seizure does not rely upon "subtle distinctions, developed and refined by the common law in evolving the body of private property law." *Jones* v. *United States*, 362 U.S. 257, 266. As was stated in *Wattenburg* v. *United States*, 388 F.2d 853, 858 (C.A. 9), "The 'curtilage' test is predicated upon a common law concept which has no historical relevancy to the Fourth Amendment guaranty." In urging that a conflict exists among the circuits (Pet. 22-23), petitioner evidently relies solely upon several pre-*Katz* rulings in which courts of appeals had focused upon protected areas of property such as the curtilage, rather than the personal expectation of privacy (Pet. 20). Compare the post-*Katz* ruling in *United States* v. *Knight*, 451 F.2d 275 (C.A. 5), certiorari denied, 405 U.S. 965, with *Walker* v. *United States*, 225 F.2d 447 (C.A. 5), cited by petitioner (Pet. 20).